

The Case for Overturning *Carter* to Protect Contract Clause Rights through Section 1983 Claims

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TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	BACKGROUND AND HISTORY OF THE CONTRACT CLAUSE, SECTION 1983, AND SHORTCOMINGS OF THE CURRENT CONTRACT CLAUSE TREATMENT	5
	A. <i>The Contract Clause over Time</i>	5
	B. <i>Section 1983 Causes of Action</i>	8
	C. <i>Consequences of the Contract Clause Exclusion</i>	9
III.	THE SPLIT EMERGES IN CONTEMPORARY CASES: THE CIRCUIT COURTS' RELIANCE ON <i>CARTER</i> IN <i>SOUTHERN CALIFORNIA GAS</i> <i>CO.</i> , <i>CROSBY</i> , AND <i>KAMINSKI</i>	12
	A. <i>Carter: An Enduring Legacy</i>	12
	B. <i>Initial Recognition of Contract Clause-Based Section 1983</i> <i>Claims</i>	14
	C. <i>Subsequent Rejection of Contract Clause-Based Section 1983</i> <i>Claims</i>	16
IV.	DECISIVELY RESOLVING THE SPLIT: THE SUPREME COURT SHOULD OVERTURN <i>CARTER</i> AND RECOGNIZE SECTION 1983 CONTRACT CLAUSE CLAIMS	19
	A. <i>Carter Revisited: Poor Reasoning, Unworkability, and</i> <i>Inconsistency with Related Decisions</i>	20
	1. <i>Carter's Quality of Reasoning</i>	20
	2. <i>Carter's Unworkability</i>	23
	3. <i>Reliance Interests in Carter</i>	23
	4. <i>Inconsistency of Carter with Section 1983 Jurisprudence</i>	24
	B. <i>Any Potential Adverse Consequences of Overturning Carter</i> <i>and Recognizing Contract Clause-Based Section 1983</i> <i>Claims Are Mitigated by State Police Powers and</i> <i>Immunities</i>	26
	C. <i>Restorative Effects of Overturning Carter</i>	27
V.	CONCLUSION.....	28

I. INTRODUCTION

After 32 years of employment with the city of Lincoln Park, Michigan, Police Chief Robert Duncan retired.¹ As a term of his employment agreement, Duncan received a pension of \$22,620 per year and health care benefits in his retirement.² But from 2002 to 2013, the funding in Lincoln Park's pension fund dropped from covering 100% of its obligations to just 22% of its obligations.³ Duncan and fellow pensioners alleged that the Lincoln Park city council and pension commissions "routinely ignored the audits and warnings" from state retirement administrators "that the system was 'failing at a catastrophic rate.'"⁴ Ultimately, the city council relinquished control of the city finances to a state-appointed emergency manager.⁵

Michigan law allowed the emergency manager to "[r]eject, modify, or terminate 1 or more terms and conditions of an existing contract,"⁶ and the emergency manager elected to replace the health care benefits for some Lincoln Park retirees with a \$150 stipend.⁷ Despite the guarantees laid out in his employment agreement for over 32 years, Duncan and his wife would no longer receive health benefits as part of his pension or cost of living adjustments.⁸ As a result, Police Chief Duncan paid nearly \$10,000 a year to replace the healthcare lost though years of mismanagement and the emergency manager's pen stroke.⁹

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¹ Jessica Strachan, *Lincoln Park Retirees Sue: A Breakdown of the Lawsuit Filed to Reinstate Health Benefits*, NEWS-HERALD (Aug. 21, 2015), http://www.thenewsherald.com/news/lincoln-park-retirees-sue-a-breakdown-of-the-lawsuit-filed/article_d2d5a146-18d8-5ee5-b735-ebe6a08de083.html [https://perma.cc/VT6S-YB2B]. The opening vignette relates the story of one of the plaintiffs from *Kaminski v. Coulter*, 865 F.3d 339 (6th Cir. 2017), where the court held that Section 1983 did not recognize Contract Clause-based causes of action.

² Strachan, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ MICH. COMP. LAWS § 141.1552(1)(j) (2018). For a discussion and analysis of Michigan's laws authorizing non-elected emergency managers to be appointed, see Sydney L. Hawthorne, *Do Desperate Times Call for Desperate Measures in the Context of Democracy? Michigan's Emergency Manager Law & the Voting Rights Act*, 41 N.Y.U. REV. L. & SOC. CHANGE 181 (2017).

⁷ *Kaminski*, 865 F.3d at 342–43.

⁸ Verified Class Action Complaint for Damages & Request for Injunctive Relief, *Kaminski v. Coulter*, No. 2:15-cv-12810-GAD-RSW (E.D. Mich. Aug. 10, 2015), ECF No. 60.

⁹ *Id.*

Lincoln Park is not alone. In other Michigan cities, the emergency manager law has enabled emergency managers to unilaterally modify collective bargaining agreements, fire local government and school district employees, and privatize services previously provided by local governments.¹⁰ A survey found that 81% of Michigan residents had low or very low trust in Michigan's emergency manager system.¹¹ Most Michigan residents "interviewed in community conversations approv[e] of 'more checks and balances' and 'shared decisions' between emergency managers and local officials."¹² But despite the criticisms of emergency managers' broad powers, lack of accountability, and circumvention of local elections, Michigan has not reined in the emergency manager law.¹³ Michigan's emergency management system is not the only example of legislation that authorizes the state to rewrite or modify contractual obligations without compensation. In other circumstances, governments have enacted laws that impose extra contractual fees upon a party under contract with the government and revised pension benefits.¹⁴

The Contract Clause of the United States Constitution provides that no state shall pass any law impairing the obligation of contracts.¹⁵ Additionally, the Civil

¹⁰ Ned Resnikoff, *Cash-Strapped Cities Seized by New Management*, MSNBC (Mar. 11, 2013), <http://www.msnbc.com/the-ed-show/cash-strapped-cities-seized-new-management> [https://perma.cc/7X69-K45L] (noting that if Detroit, Michigan enters emergency management, "roughly half of the state's black population, living in primarily urban centers" would be supervised by leaders who were not democratically elected and that more than 5000 unionized municipal employees would "totally lose control" of collective contract bargaining).

¹¹ Ted Roelofs, *Michiganders Say Emergency Managers Wield Too Much Power*, BRIDGE MAG. (Mar. 21, 2017), <https://www.bridgemi.com/public-sector/michiganders-say-emergency-managers-wield-too-much-power> [https://perma.cc/T4EN-ERCP] (noting that the report of public dissatisfaction with Michigan's emergency manager laws was made at "a time of extraordinary local and national attention focused on Flint, [Michigan] as it became clear that state emergency managers were largely responsible for decisions that led to toxic lead entering the city's water supply" and that "[i]t was a state-appointed manager who first approved plans to switch the source of Flint's drinking water to the Flint River, without ensuring the water was properly treated").

¹² *Id.*

¹³ Jonathan Oosting, *Michigan: No Emergency Managers for First Time Since '00*, DETROIT NEWS (June 27, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/06/27/michigan-no-emergency-managers-first-time-since-2000/737947002/> [https://perma.cc/UBJ8-FNL9]. In fact, June 2018 marked the first time in eighteen years that no Michigan city was under emergency management. *Id.*

¹⁴ *See* S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003) (*per curiam*) (ruling on a local municipal ordinance that created additional fees chargeable to a utility company for work being performed under an existing contract with the municipality) (citing the lower court decision, 202 F. Supp. 2d 1129 (C.D. Cal. 2002)); Crosby v. City of Gastonia, 635 F.3d 634, 637 (4th Cir. 2011) (ruling on a municipal police pension fund that dissolved and halted retirees' benefits after the pension fund's insolvency, which was caused at least in part by the cessation of contributions to the fund).

¹⁵ U.S. CONST. art. 1, § 10, cl. 1. ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make

Rights Act of 1871, codified as 42 U.S.C. § 1983, provides equitable relief when constitutional rights, privileges, or immunities are violated by individuals under the color of law.¹⁶ Yet three federal circuit courts are split on whether or not the Contract Clause recognizes an individual right that can be protected through Section 1983 claims.¹⁷ In 2017, when the Sixth Circuit reviewed the scenario at the beginning of this Note, the court held that Police Chief Duncan and other affected pensioners were not protected by the Contract Clause when an unelected state official unilaterally rewrote their employment contracts.¹⁸ In reaching this conclusion, the court relied upon dicta from *Carter v. Greenhow*,¹⁹ an 1885 Supreme Court decision that addressed Contract Clause claims under a predecessor to Section 1983.²⁰ To clarify modern Section 1983 doctrine, the Supreme Court should directly overturn *Carter* and remove the confusion created by *Carter*'s legacy.

To illuminate this issue, this Note will examine the limiting effects of failing to recognize Contract Clause-based Section 1983 claims. Further, this Note will propose that the Supreme Court resolve the circuit split by overturning *Carter* and formally recognizing Contract Clause-based Section 1983 claims in accordance with the broad application of Section 1983 that the Court applied in *Dennis v. Higgins*. Specifically, Part II of this Note will briefly explore the history of the Contract Clause, Section 1983, and the effects of failing to recognize Contract Clause-based Section 1983 claims. Next, Part III will analyze *Carter* and explore the Supreme Court's placement of this case in Section 1983 jurisprudence. Part III will also outline the reasoning of the circuit courts in *Southern California Gas Company*, *Crosby*, and *Kaminski*, which created the circuit split regarding the Contract Clause and Section 1983. Part IV proposes that *Crosby*, *Southern California Gas Company*, and *Kaminski* illustrate that *Carter* has proven ill-reasoned, unworkable, and inconsistent with

any Thing but gold and silver Coin a Tender in Payment of Debts; *pass any* Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.”) (emphasis added).

¹⁶ 42 U.S.C. § 1983 (2018) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

¹⁷ *Kaminski v. Coulter*, 865 F.3d 339, 349 (6th Cir. 2017); *Crosby*, 635 F.3d at 634; *S. Cal. Gas Co.*, 336 F.3d at 885; *see also* *Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs.*, 876 F.3d 926, 932 (7th Cir. 2017) (declining to rule on a Contract Clause-based Section 1983 claim because defendants waived the issue prior to appeal).

¹⁸ *Kaminski*, 865 F.3d at 339 (denying Contract Clause-based Section 1983 claims when an emergency manager unilaterally altered employment and retiree benefits under Michigan emergency management laws).

¹⁹ *Carter v. Greenhow*, 114 U.S. 317, 322–23 (1885) (denying landowner's contract claim against tax collector for refusing to accept state-issued bond coupons as payment for property taxes).

²⁰ *Kaminski*, 865 F.3d at 346.

contemporary Section 1983 doctrine, making *Carter* ripe for overturn. Finally, Part V concludes that the Court would protect a textual constitutional right and reconcile Contract Clause rights with contemporary Section 1983 doctrine with the overturn of *Carter*.

II. BACKGROUND AND HISTORY OF THE CONTRACT CLAUSE, SECTION 1983, AND SHORTCOMINGS OF THE CURRENT CONTRACT CLAUSE TREATMENT

On its face, the Contract Clause was intended to broadly protect contractual rights in public and private agreements.²¹ And Section 1983 was created as a vehicle to protect and vindicate federal rights against infringement.²² Yet, the Contract Clause has not been uniformly recognized as a valid basis for a Section 1983 claim, leading to limited means for individuals to hold state actors accountable for impairing their rights.²³ This Part will explore the histories of the Contract Clause and Section 1983 claims before discussing the shortcomings of the current Contract Clause jurisprudence.

A. *The Contract Clause over Time*

The security of property rights was a primary concern of the Founding Fathers during the period when the U.S. Constitution was drafted.²⁴ During the Constitutional Convention, participants debated the scope of protections necessary to prevent legislatures from infringing on the rights of contractual parties.²⁵ Participants settled on the language of the Contract Clause that no state law shall “impair the obligations of contracts.”²⁶ Though there is evidence that

²¹ U.S. CONST. art. 1, § 10, cl. 1. (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”) (emphasis added).

²² See *Kaminski*, 865 F.3d at 349 (Contract Clause-based Section 1983 claim rejected); *Crosby*, 635 F.3d at 645 (Contract Clause-based Section 1983 claim rejected); and *S. Cal. Gas Co.*, 336 F.3d at 898 (Contract Clause-based Section 1983 claim allowed) (citing the lower court decision, 202 F. Supp. 2d 1129 (C.D. Cal. 2002)); see also *Elliott*, 876 F.3d at 926 (bypassing a ruling on a Contract Clause-based Section 1983 claim because defendants waived the issue prior to appeal).

²³ See 42 U.S.C. § 1983 (2018); see also Martin A. Schwartz & George C. Pratt, *Section 1983*, 9 Touro L. Rev. 3, 36 n.241 (1992) (citing *Dennis v. Higgins*, 498 U.S. 439, 443 (1991)) (noting legislative history of Section 1983 provides guidance that the statute is “remedial” and should be “liberally interpreted”).

²⁴ See JAMES W. ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* 11–12 (2016) (noting that the Framers had already expressly protected contractual rights in the Northwest Ordinance of 1787 and that the Contract Clause mirrored the Ordinance).

²⁵ *Id.* at 12–13 (noting that Rufus King first moved to include contractual protections that mirrored the Northwest Ordinance of 1787, but that Gouverneur Morris and George Mason resisted the idea because of concerns on limiting legislatures’ power to act and because they thought judicial checks on legislative actions would be sufficient).

²⁶ *Id.* at 13.

the Convention committee intended to extend a level of protection to contracts that approximated protection against ex post facto laws in criminal matters, the full extent of the Contract Clause's purpose and the Framers' intent is not explicit.²⁷

During ratification, Federalist commentators viewed the Contract Clause variously as an assurance that contractual parties would have certainty in their agreements, a bar to debt-relief legislation, and a guardrail for "personal security and private rights."²⁸ Even Anti-Federalists endorsed the protections offered by the Contract Clause.²⁹ Early court cases seemed to embrace a broad view of the Contract Clause's protections.³⁰ This view was consistent with the understanding of the Contract Clause at the time of ratification.³¹ By the time of the Civil War, the Contract Clause was widely litigated, serving as both a protector of contractual rights in public and private agreements and the primary vehicle for judicial review of legislation.³²

However, in the aftermath of the Civil War, state police powers and the emergence of due process jurisprudence weakened the application and

²⁷ *Id.* (explaining that John Dickinson reportedly relied upon William Blackstone's *Commentaries on the Law of England* to determine that ex post facto law protections would not apply to civil, contractual matters). The writing committee was comprised of Alexander Hamilton, William S. Johnson, Rufus King, James Madison, and Gouverneur Morris, but historians have not yet identified the author of the Contract Clause. *Id.*

²⁸ *See id.* at 15–16; *see also* THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) ("[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 932 (1984) ("Believing that government should promote the *general* welfare, rather than the welfare of a particular group, the Framers included the contract clause to prevent the majority of debtors from abusing the creditor minority." (footnote omitted)).

²⁹ ELY, *supra* note 24, at 17 (observing some Anti-Federalists offered even stronger proposals and were more concerned with enforcement of the prohibition by state courts versus federal courts, than the prohibition itself).

³⁰ *Id.* at 22–24 (recounting *Champion and Dickason v. Casey* (1792), where the U.S. Circuit Court for Rhode Island blocked the application of a law to a preexisting contract because it would "impair the Obligation of the Contract in question" and *Chisholm v. Georgia* (1793), where the Supreme Court applied the Contract Clause to a state contract); *see also* Craig R. Shagin, Recent Developments, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), 25 VILL. L. REV. 160, 162–63 (1979) (noting that in the early nineteenth century, the Supreme Court held that the Contract Clause applied to both "contracts to which the state is a party, as well as to private contracts").

³¹ *See* Rappaport, *supra* note 28, at 923–24, 924 n.24 ("An absolute reading of the clause does not cripple the powers of government for which the Framers provided. Although the clause is not limited by a balancing requirement . . . [t]he clause applies only to action by the states . . . and to retroactive but not prospective impairment.").

³² *See* ELY, *supra* note 24, at 103–05 (discussing the rise of the Contract Clause in prominence, exceptions to the broadly-applied doctrine, and the relative lack of hardship of the strict application of the Contract Clause prior to the Civil War).

importance of the Contract Clause as a protective guarantee.³³ The Supreme Court's decision in *Home Building & Loan Association v. Blaisdell* in 1934 seemed to mark the practical end of the Contract Clause as a broad prohibition against legislative actions impairing contractual rights.³⁴ Yet, in 1977, the *United States Trust* Court reaffirmed that the Contract Clause still functioned as a check on governmental police powers.³⁵ In the decision, the Court articulated a Contract Clause test that applied to impairments of both private and public contracts.³⁶ Shortly after, the Court clarified that as a threshold matter, a law must act as "substantial impairment of a contractual relationship" before potentially violating the Contract Clause.³⁷

Modern Contract Clause jurisprudence summarizes Contract Clause analysis as a two-step test.³⁸ First, has the state law "'operated as a substantial impairment of a contractual relationship?'"³⁹ And second, was the law in question "drawn in an 'appropriate' and 'reasonable' way to advance 'a

³³ *Id.* at 190–91 (observing that by the 1890s, litigation strategies generally shifted to include due process claims with Contract Clause claims and that the strength of the Contract Clause in jurisprudence significantly waned).

³⁴ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447–48 (1934); *see also* Jordan Bleznick, Case Comment, *Revival of the Contract Clause*, 39 OHIO ST. L.J. 195, 198 (1978) (quoting *Blaisdell*, 290 U.S. at 438) (noting that the Court held that "legislative alteration of the private contract did not violate the contract clause" if a statute "addressed . . . a legitimate end and the measure taken [was] reasonable and appropriate to that end").

³⁵ *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 16 (1977) (holding that a New Jersey law violated the Contract Clause of the United States Constitution by unreasonably and unnecessarily eliminating a purely financial obligation); *id.* ("Both of these [modern] cases eschewed a rigid application of the Contract Clause to invalidate state legislation. Yet neither [of the decisions] indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory. Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution.").

³⁶ *Id.* at 29–31; *see also* Bleznick, *supra* note 34, at 203 (summarizing that the *United States Trust* Court held that "[i]mpairments of both private and state contractual obligations must be both reasonable and necessary; that is, the legislation must be (1) addressed to changed circumstances unforeseeable at the time the contract was formed—the reasonableness requirement; and (2) the least restrictive means of accomplishing an important state purpose—the necessity requirement" (footnotes omitted)).

³⁷ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (holding that legislation imposing additional burdens on a private company's pension program violated the Contract Clause); *id.* at 245 ("The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.").

³⁸ *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018) (also noting that whether a substantial impairment of a contractual right exists depends on the extent of the impairment, interference with the parties' reasonable expectations, and whether the law in question "prevents the party from safeguarding or reinstating his rights").

³⁹ *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 244).

significant and legitimate public purpose?”⁴⁰ Some scholars have concluded that the Contract Clause embodies an individual right.⁴¹ Despite these recent reminders that the Contract Clause remains a part of the Constitution and the articulation of a standard that reconciles Contract Clause protections with state police powers, Contract Clause jurisprudence has yet to uniformly recognize the right of an individual to bring Contract Clause-based Section 1983 claims.⁴²

B. Section 1983 Causes of Action

The statute 42 U.S.C. § 1983 (“Section 1983”) protects individuals when public officials violate constitutional rights by providing a mechanism that allows the individuals to bring suit against the official and by encouraging individuals to vindicate their rights through features such as recovery of legal costs for the action.⁴³ Section 1983 was enacted during the Reconstruction period to protect individuals from discrimination and was not widely utilized to bring claims against state officials until the Supreme Court’s decision in *Monroe v. Pape* in 1961.⁴⁴ Legislative history suggests that Section 1983 should be broadly construed.⁴⁵ Section 1983 provides protections against the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”⁴⁶

⁴⁰ *Id.* (citing *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983)).

⁴¹ See Schwartz & Pratt, *supra* note 23, at 36–37 (“In addition, the Contract Clause is a clause which gives, in no uncertain terms, a right to an individual to be free of governmental impairment of contracts.”).

⁴² See *Kaminski v. Coulter*, 865 F.3d 339, 349 (6th Cir. 2017) (Contract Clause-based Section 1983 claim rejected); *Crosby v. City of Gastonia*, 635 F.3d 634, 645 (4th Cir. 2011) (Contract Clause-based Section 1983 claim rejected); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 898 (9th Cir. 2003) (per curiam) (Contract Clause-based Section 1983 claim allowed).

⁴³ See 42 U.S.C. § 1983 (2018); see also Schwartz & Pratt, *supra* note 23, at 36 n.241 (citing *Dennis v. Higgins*, 498 U.S. 439, 443 (1991)) (noting legislative history of Section 1983 provides guidance that the statute is “remedial” and should be “liberally interpreted”); Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties under Section 1983?*, 26 CARDOZO L. REV. 9, 13–14 (2004) (noting that Section 1983 actions allow procedural advantages to plaintiffs such as the availability of attorney’s fees; federal court jurisdiction; sometimes longer statutes of limitations; a possibility of punitive damages, as well as substantive advantages such as avoiding liability limitations and immunities granted under state laws).

⁴⁴ *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by* *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658 (1978); see MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 1 (3d ed. 2014).

⁴⁵ See Schwartz & Pratt, *supra* note 23, at 36 n.241 (citing *Dennis*, 498 U.S. at 443) (“[L]egislative history of 42 U.S.C. § 1983 indicates that it is a remedial statute which should be liberally interpreted.”).

⁴⁶ *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105, 107 (1989) (holding that the Supremacy Clause could not form a valid basis for a Section 1983 claim because the Supremacy Clause “secures federal rights by according them priority whenever

Not every “right” forms a valid basis for a Section 1983 action, though.⁴⁷ Courts have applied a two-prong test to determine whether a deprivation of rights, privileges, or immunities can form the basis of a Section 1983 claim.⁴⁸ First, the court examines whether the federal provision in question “creates obligations binding on the governmental unit or rather ‘does no more than express a congressional preference for certain kinds of treatment,’” and whether such an interest is “‘too vague and amorphous’ [as] to be ‘beyond the competence of the judiciary to enforce.’”⁴⁹ Second, the court considers whether “Congress ‘specifically foreclosed a remedy under § 1983 by providing a ‘comprehensive enforcement mechanism for protection of a federal right.’”⁵⁰ Generally, Section 1983 is construed broadly.⁵¹ Within the U.S. Constitution, the First Amendment, Second Amendment, Fourth Amendment, Eighth Amendment, Fourteenth Amendment, and Commerce Clause have been constructed to grant rights, privileges, and immunities that form valid sources of rights for Section 1983 claims.⁵²

C. Consequences of the Contract Clause Exclusion

The failure to uniformly recognize Contract Clause-based Section 1983 claims denies potential plaintiffs the benefits unique to Section 1983. This denial means that potential plaintiffs are less likely to bring actions to protect their rights.⁵³ The chilling effect occurs because plaintiffs are not able to recover their litigation costs, may have to exhaust all possible state and administrative remedies, and may not be able to seek immediate injunctive relief through a Contract Clause claim alone.⁵⁴ Additionally, potential plaintiffs are denied the opportunity to automatically bring their claims in federal court, diminishing the

they come in conflict with state law,” but is not itself the source of any individual federal right).

⁴⁷ *Id.* at 106.

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)).

⁵⁰ *Id.*

⁵¹ *Id.* at 105 (citing *Felder v. Casey*, 487 U.S. 131, 139 (1988); *see also* *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Dennis, v. Higgins*, 498 U.S. 439, 443 (1991)).

⁵² *See* SCHWARTZ, *supra* note 44, at 29–30.

⁵³ Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/> [<https://perma.cc/MGQ3-H8ED>] (noting that the high costs of litigation deter even high-wealth individuals from pursuing civil actions).

⁵⁴ James P. McMahon, *Section 1983 Causes of Action Under the Contracts Clause of the Constitution*, 21 GEO. MASON L. REV. 467, 474–76 (2014) (listing litigation advantages of pursuing actions to protect constitutional rights through Section 1983 claims).

chances that they may seek to protect their rights at all.⁵⁵ These costs are particularly limiting to the financially disadvantaged and minorities.⁵⁶

Potential solutions for plaintiffs through contract law alone are insufficient to protect individual interests in cases where the individual is a party to a contract with the state. First, state contract law does not address the underlying constitutional protections of the Contract Clause.⁵⁷ When state officials act under the color of state law and violate an individual's constitutional right, any related breach of contract is a second and different issue than the violation of the individual's constitutional right. In *Horwitz-Matthews, Inc. v. City of Chicago*, Judge Posner illustrated an example of a situation like this.⁵⁸ Judge Posner hypothesized:

We must consider, however, the bearing of [a] clause in the offer that entitles [a municipality] to withdraw [from the contract] if a [state] legislative body prevents [the municipality] from honoring the contract. This is a force majeure clause, excusing nonperformance under stated conditions. If the State of Illinois passed a law forbidding the City of Chicago to sell land for redevelopment, the clause would kick in, the City would be off the hook, and [the buyer], its contractual remedy extinguished by the effect of the state statute operating through the force majeure clause,

⁵⁵ *Id.* at 47576 (noting that federal jurisdiction is more advantageous to plaintiffs because federal judges are more familiar with Section 1983 claims and potential bias in state and local courts may not be detached from the state law impairing contractual rights).

⁵⁶ See Buckwalter-Poza, *supra* note 53 (reporting that at least one party in the majority of civil cases filed in the United States lacks representation and that “[o]n the civil side, people of color, women, immigrants, the elderly, people with disabilities, and lesbian, gay, bisexual, and transgender, or LGBT, people are more likely to live in poverty and more likely to need legal assistance.” (footnotes omitted)). But see SCHWARTZ, *supra* note 44, at 21, 210 n.151 (noting that many Section 1983 claims are brought pro se by prisoners and that the vast majority of such pro se claims are dismissed by the courts). So even Section 1983 causes of action do not eliminate all disparities amongst the poor or minorities in the vindication of constitutional rights. See *id.*

⁵⁷ See Thomas McDonell, Comment, *Reevaluating the Seventh Circuit’s Approach to Contract Clause Claims in an Age of Pension Reform*, 2014 WIS. L. REV. 659, 671 (2014) (observing that “courts in ordinary breach of contract suits (nonconstitutional claims) are hesitant to mandate specific performance, and breach of contract damages themselves are subject to certain defenses”).

⁵⁸ *Horowitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996). In *Horwitz-Matthews, Inc.*, a real estate developer purchased real property from the City of Chicago for redevelopment in accordance with the City’s development plan. *Id.* at 1249. The real estate contract included a clause that allowed the City of Chicago to terminate the sale before transfer of the title if the City was enjoined or prevented from completing the sale by a legislative act or an executive order. *Id.* The City of Chicago initially approved the sale through an ordinance, but later passed a second ordinance that repealed the first. *Id.* at 1249–50. The developer sued the City of Chicago for violating the Contract Clause. *Id.* The Seventh Circuit found that a mere breach of contract had been committed and that the City of Chicago did not violate the Contract Clause. *Id.* at 1250–52.

would have a good [Contract Clause] claim against the State for having impaired the obligation of the developer's contract.⁵⁹

Second, the state retains unequal bargaining power in public contracts because the state legislature defines the state law governing those contracts. This differential is greatly exacerbated when the state acts within state laws created for dealing with emergencies by unilaterally changing contractual rights.⁶⁰ The state is an interested party in agreements that legislation has been used to unilaterally change. This creates the greatest potential for states and state officials to act in ways that violate the Contract Clause rights of individuals in public contracts.⁶¹ A check other than state contract law must be available to protect these individuals.⁶²

Finally, other sources of rights, such as the Due Process Clause, do not form a sufficient basis for protecting individuals' rights in contract with the state. State law defines contractual rights and remedies.⁶³ Moreover, because a constitutional right is at stake, a constitutional cause of action is most appropriate.⁶⁴ Without a constitutional cause of action, those who enter into public agreements and contracts are uniquely vulnerable and subject to high penalties in the name of the public good, but are left without any individual recourse. Plaintiffs are left without an effective mechanism to enforce a constitutional guarantee because their contract rights are not necessarily recognized in state law, and courts are split on the validity of Contract Clause-based Section 1983 claims.

⁵⁹ *Id.* at 1251 (internal citations omitted).

⁶⁰ Imagine a football game where one of the teams also made the rules, gave itself the power to change the rules after the game had begun, and then also created the rules governing any protest of those changes.

⁶¹ See McDonell, *supra* note 57, at 670 ("Contract Clause claims can actually enhance the meaning of a contract between the state and its citizens; the terms of a contract take on more significance when the state cannot unilaterally alter the agreement—and do so with immunity from constitutional violation.").

⁶² *Id.* at 671 (discussing *Horwitz-Matthews, Inc. v. City of Chicago* and noting that the City of Chicago successfully argued a defense that breach of contract was unavoidable and that the City could not "be held liable for a breach of contract when . . . insufficient funds exist to fulfill a contractual obligation").

⁶³ See, e.g., *Kaminski v. Coulter*, 865 F.3d 339, 347–49 (6th Cir. 2017) (holding that an emergency manager's unilateral revocation of retiree benefits did not violate due process rights because all, and not specific, retirees of the municipality were affected by the decision and holding that a Takings Clause claim was not ripe because state contractual remedies were not first exhausted).

⁶⁴ See McDonell, *supra* note 57, at 675 ("Crucially, unilateral modification of public sector bargaining agreements by a state legislature generally implicates constitutional issues, as opposed to contractual or statutory issues.").

III. THE SPLIT EMERGES IN CONTEMPORARY CASES: THE CIRCUIT COURTS' RELIANCE ON *CARTER* IN *SOUTHERN CALIFORNIA GAS CO.*, *CROSBY*, AND *KAMINSKI*

Circuit courts are split on whether or not the Contract Clause represents an individual right that can be protected through Section 1983 claims.⁶⁵ This Part will explore the *Carter* decision and Supreme Court cases applying *Carter*. Then, this Part will examine how the courts interpreted *Carter* and Supreme Court jurisprudence to either deny or recognize Contract Clause-based Section 1983 claims, creating the circuit split.

A. *Carter*: An Enduring Legacy

Decided in 1885 among the *Virginia Coupon Cases*, *Carter v. Greenhow* held that a taxpayer did not state a cognizable cause of action under the Civil Rights Act when a Virginia tax collector refused bond interest coupons as payment for taxes after the state law changed and disallowed the form of payment.⁶⁶ Importantly, it must be noted, as the Court did, that *Carter* did not plead a Contract Clause rights violation.⁶⁷ The Court opined that Contract Clause rights are conferred “only indirectly and incidentally,” but noted that individuals whose rights are impaired by legislation are entitled to file suit and have such laws declared “null.”⁶⁸ Subsequently, *Carter* has been interpreted by some courts to bar Contract Clause-based Section 1983 claims, and by others to limit the claims to instances where citizens have been denied the opportunity to adjudicate claims that their contractual rights were impaired.⁶⁹ But the Supreme Court has already provided guidance on *Carter* and the context in which it should be viewed for Section 1983 claims, which forecloses these interpretations.

In the landmark decision *Dennis v. Higgins*, the Supreme Court recognized Commerce Clause-based Section 1983 claims, observing that the Commerce

⁶⁵ See, e.g., *Kaminski*, 865 F.3d at 339 (no individual constitutional right under the Contract Clause that can be enforced through Section 1983); *Crosby v. City of Gastonia*, 635 F.3d 634 (4th Cir. 2011) (no Contract Clause-based Section 1983 claim); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003) (per curiam) (allowing Contract Clause-based Section 1983 claim).

⁶⁶ *Carter v. Greenhow*, 114 U.S. 317 (1885). For a brief discussion of the history and context of the *Virginia Coupon Cases*, see ELY, *supra* note 24, at 182–84.

⁶⁷ *Carter*, 114 U.S. at 322 (“But of this [Contract Clause right] the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it.”).

⁶⁸ *Id.*

⁶⁹ *Kaminski*, 865 F.3d at 347 (“[A]n alleged Contracts Clause violation cannot give rise to a cause of action under § 1983.”); *Crosby*, 635 F.3d at 640–41, *cert. denied*, 565 U.S. 823 (2011) (“[T]he Contracts Clause is limited to the discrete instances where a state has denied a citizen the opportunity to seek adjudication through the courts as to whether a constitutional impairment of a contract has occurred, or has foreclosed the imposition of an adequate remedy for an established impairment.”).

Clause was not merely a prohibition on the state's power, but the source of individual rights.⁷⁰ The Court rejected the characterization of the Commerce Clause as an analogy to the Supremacy Clause, which does not confer individual rights, but resolves conflicts between federal and state laws.⁷¹ While this case did not directly touch on Contract Clause-based Section 1983 claims, the Court provided important context for understanding *Carter* in Section 1983 jurisprudence.

Noting that the Supreme Court has held that Section 1983 was intended to provide relief for infringements of "any rights, privileges, or immunities secured by the Constitution and laws," the *Dennis* Court noted that the rights included within Section 1983's scope must be "broadly" and "liberally and beneficently construed" to achieve Congress's intent for the legislation.⁷² Furthermore, the Court rejected distinctions between different types of constitutional rights, privileges, and immunities protected under Section 1983.⁷³ The *Dennis* Court also applied the "right" framework from *Golden State Transit Corp. v. Los Angeles*, analyzing the Commerce Clause under the considerations set forth in that case to determine whether or not a federal statute conferred rights to individuals.⁷⁴ Under this test, a court should consider three factors to determine if a federal statute confers a right: (1) whether the statute "creates obligations binding on the governmental unit" or just expresses a legislative preference for particular treatment; (2) whether the interest that the plaintiff asserts is "too vague and amorphous" and beyond the judiciary's competence to enforce; and (3) whether statute was "intended to benefit the putative plaintiff."⁷⁵ The *Dennis* Court found that these three factors counseled for individual rights under the Commerce Clause, rejecting the assertion that the Commerce Clause was not intended to benefit individuals.⁷⁶

Justice Kennedy, in his dissent, invoked the Contract Clause as an analogy to the Commerce Clause under Section 1983.⁷⁷ Justice Kennedy proposed that the Contract Clause created an individual right, which could be adjudicated under Section 1983, more than any individual right that could be said to exist under the Commerce Clause.⁷⁸ The *Dennis* Court responded to Justice Kennedy

⁷⁰ *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) ("[T]he Commerce Clause of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations.") (resolving a circuit split by recognizing Commerce Clause-based Section 1983 claims and allowing the plaintiff to collect legal fees after a state imposed certain taxes exclusively on trailers registered outside of the state).

⁷¹ *Id.*

⁷² *Id.* at 443.

⁷³ *Id.* at 446–47.

⁷⁴ *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

⁷⁵ *Dennis*, 498 U.S. at 447.

⁷⁶ *Id.* at 449–50.

⁷⁷ *Id.* at 451–58 (Kennedy, J., dissenting).

⁷⁸ *Id.* at 458 (Kennedy, J., dissenting) ("If the Contracts Clause, an express limitation upon States' ability to impair the contractual rights of citizens, does not secure rights within

by noting that *Carter* is a narrow holding in which a contract cause of action was pleaded, not a decision regarding the validity of a Contract Clause-based Section 1983 claim.⁷⁹ This was, in fact, not the first occasion that the Supreme Court noted that *Carter*'s holding was narrow and regarded a contract claim and not a Section 1983 claim.⁸⁰

B. Initial Recognition of Contract Clause-Based Section 1983 Claims

In the wake of *Dennis*, the Ninth Circuit recognized Contract Clause-based Section 1983 claims when it held in *Southern California Gas Co. v. City of Santa Ana* that a municipality's ordinance violated a utility provider's Contract Clause rights.⁸¹ The City of Santa Ana adopted an ordinance assigning the Southern California Gas Company rights to build and maintain gas pipes under the city in exchange for a percentage of the revenue that the company generated through its utility service in 1938.⁸² In 2001, the City of Santa Ana adopted a new ordinance which required payments from any party "wishing to perform excavations or trench cuts."⁸³ Southern California Gas Company sued the City of Santa Ana, asserting in part that the city ordinance substantially impaired the company's rights under the 1938 agreement in violation of the Contract Clause.⁸⁴

The trial court granted summary judgment to the company, recognizing a Contract Clause-based Section 1983 claim and holding that the City of Santa Ana's ordinance substantially impaired the company's rights under the 1938 agreement.⁸⁵ The court in fact took for granted that Section 1983 jurisprudence accepted the Contract Clause as a basis for a Section 1983 claim because the opinion is devoid of any reference to *Carter* or *Dennis*.⁸⁶ The court noted that "[though] written in absolute terms, the Supreme Court narrowly construes the Contract Clause to ensure that local governments can effectively exercise their

the meaning of § 1983, it assuredly demands a great leap for the majority to conclude that the Commerce Clause secures the rights of persons. The Commerce Clause is, if anything, a less obvious source of rights for purposes of § 1983, as its text only implies a limitation upon state power.").

⁷⁹ *Id.* at 451 n.9 ("[*Carter*] held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.'") (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979)).

⁸⁰ See, e.g., *Chapman*, 441 U.S. at 613 n.29; *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939).

⁸¹ *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887–98 (9th Cir. 2003) (per curiam).

⁸² *Id.* at 887.

⁸³ *Id.* at 888.

⁸⁴ *Id.*

⁸⁵ *Id.* at 887–98.

⁸⁶ *Id.*

police powers.”⁸⁷ The court expounded that although local governments must possess sufficiently broad powers that do not implicate private contract rights,⁸⁸ “[a] higher level of scrutiny is required” when the legislative interference involves a public rather than a private obligation.”⁸⁹ The trial court’s opinion highlights the tension that exists between ensuring that a legislature is free to act to address the public good without the ability to wipe away public contractual obligations.

In reaching its conclusion, the district court applied federal law to determine if the 1938 agreement was a contract for the purpose of the Contract Clause.⁹⁰ Finding that the agreement was a contract under the Contract Clause, the court applied a scrutiny test under which the ordinance could survive if the impairment was “both reasonable and necessary to fulfill an important public purpose,” such that the impairment [was] justifiable.”⁹¹ Such a test addresses the concern that a government must be free to address the public good, while protecting private rights in public contracts.

Under the scrutiny analysis, the court found that the ordinance substantially impaired the 1938 agreement because the ordinance imposed an additional financial burden on the company and impaired the company’s right to install and maintain gas lines under Santa Ana.⁹² Consequently, the court analyzed whether such an impairment was reasonable and necessary to an important public purpose.⁹³ The court noted that whether the ordinance was reasonable or unreasonable hinged on whether the impairment was solving a problem which “existed at the time of the contractual obligation.”⁹⁴ Because Santa Ana admitted that the harms addressed by the ordinance were “explicitly anticipated in 1938,” the ordinance was an attempt to charge the company for problems known at the time of the making of the contract.⁹⁵ Thus, the ordinance was unreasonable and could not justify the substantial impairment of the original agreement.⁹⁶

Further, the court noted that the ordinance was not necessary because as an alternative to “imposing additional financial burdens on a private party, obvious more moderate alternatives” existed, including the options to raise taxes or

⁸⁷ *S. Cal. Gas Co.*, 336 F.3d at 889.

⁸⁸ *Id.* (first quoting *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22 (1977); and then quoting *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 889–90 (quoting *Cayetano*, 183 F.3d at 1106).

⁹² *Id.* at 890–94.

⁹³ *S. Cal. Gas Co.*, 336 F.3d at 894 (citing lower court decision, 202 F. Supp. 2d 1129 (C.D. Cal. 2002)).

⁹⁴ *Id.* at 895 (quoting *Cayetano*, 183 F.3d at 1107). This contract impairment analysis originates in *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

⁹⁵ *S. Cal. Gas Co.*, 336 F.3d at 896 (citing lower court decision, 202 F. Supp. 2d 1129 (C.D. Cal. 2002)).

⁹⁶ *Id.*

impose budget restrictions.⁹⁷ “If Santa Ana’s recognition of higher costs alone sufficed, few if any contracts with government entities would be safe from impairment.”⁹⁸ This conclusion poignantly strikes at the heart of the problem with disallowing Contract Clause-based Section 1983 claims—without a legal mechanism to protect private rights in public contracts, governments may essentially legislate their way out of public obligations, undermining contractual rights and creating an unchecked risk for any party in contract with the government that the government may simply change the bargain at any time.

On appeal, the Ninth Circuit Court of Appeals affirmed the lower court’s ruling and found Santa Ana’s claim that Section 1983 provided “no relief for a party deprived of its rights under the Contracts Clause . . . without merit.”⁹⁹ The Ninth Circuit noted that, under *Dennis*, Section 1983 rights were to be liberally and beneficially construed.¹⁰⁰ In holding that the Contract Clause gives individuals a right not to have their contractual obligations impaired by the state, the court observed that Section 1983 allows a Contract Clause-based cause of action. Further, the court noted that *Carter* has been narrowed by the Supreme Court and did not eliminate Contract Clause-based Section 1983 claims because *Carter*’s observations regarding the Contract Clause were dicta.¹⁰¹

In this decision, the Ninth Circuit presents a balanced approach to protecting both the government’s ability to make necessary laws to address the public good and the interests and rights of parties in contract with the state. But more importantly, the court properly placed the *Carter* decision in the pantheon of Contract Clause law, properly characterizing *Carter* as a limited decision and one which was not made on the merits of an actual Contract Clause-based claim. This decision brings the Contract Clause in balance with modern Section 1983 jurisprudence which the Supreme Court held should be “liberally and beneficially construed.”¹⁰²

C. Subsequent Rejection of Contract Clause-Based Section 1983 Claims

Not all courts have interpreted *Dennis* to stand for the Supreme Court’s recognition that Section 1983 protects Contract Clause rights as the Ninth Circuit did in *Southern California Gas Co.*¹⁰³ Recent cases from the Fourth and

⁹⁷ *Id.* at 897.

⁹⁸ *Id.*

⁹⁹ *Id.* at 886 (per curiam).

¹⁰⁰ *Id.* at 887 (citing *Dennis v. Higgins*, 498 U.S. 439, 443 (1991)).

¹⁰¹ *S. Cal. Gas Co.*, 336 F.3d at 887 (quoting *Dennis*, 498 U.S. at 451 n.9) (“*Carter* can only be read to have ‘held as a matter of pleading that the particular cause of action set up in the plaintiff’s pleading was in contract and was not to redress deprivation of the right secured to him by that clause of the Constitution [the contract clause], to which he had chosen not to resort.’”).

¹⁰² *Id.* (citing *Dennis*, 498 U.S. at 443).

¹⁰³ Compare *id.* (recognizing Contract Clause-based Section 1983 claims), with *Kaminski v. Coulter*, 865 F.3d 339 (6th Cir. 2017) (rejecting Contract Clause-based

Sixth Circuits demonstrate the misconception that *Carter* stands for the proposition that Contract Clause claims are not cognizable under Section 1983.¹⁰⁴ This inconsistency has helped form the jumbled jurisprudence that exists today.

In 1955, the North Carolina General Assembly created the Gastonia Policemen's Supplemental Pension Fund through legislation.¹⁰⁵ Decades later, the pension fund began experiencing financial difficulties, and an audit of the fund revealed that it was on a path to failure without additional funding.¹⁰⁶ After the funding efforts appeared to be in vain, active police officers were allowed to remove their contributions to the fund, and the pension fund became insolvent.¹⁰⁷ Retired police officers, who had bargained for and contributed to the supplemental pension, were left without any further payments from the pension.¹⁰⁸ The Fourth Circuit Court of Appeals reviewed the retirees' claims.¹⁰⁹

The Fourth Circuit held that the retirees could not articulate a Contract Clause-based Section 1983 claim because *Carter v. Greenhow* limited such claims to "discrete instances where a state has denied a citizen the opportunity to seek adjudication through the courts as to whether a constitutional impairment of a contract has occurred, or has foreclosed . . . an adequate remedy . . ."¹¹⁰ The court reasoned that the Supreme Court's discussion of *Carter* in *Dennis v. Higgins* did not serve to limit *Carter*, but merely served as a discussion of the proper analysis of Section 1983 claims.¹¹¹ Since no federal rights of the retirees were implicated by the city's actions regarding the pension plan, there was no

Section 1983 claims), and *Crosby v. City of Gastonia*, 635 F.3d 634, 640–41, *cert. denied*, 565 U.S. 823 (2011) (same).

¹⁰⁴ *Kaminski*, 865 F.3d at 347 (finding no individual constitutional right under the Contract Clause that can be enforced through Section 1983); *Crosby*, 635 F.3d at 641 (no Contract Clause-based Section 1983 claim).

¹⁰⁵ *Crosby*, 635 F.3d at 636 (noting that each retired policeman was to receive pension payments "monthly for the remainder of his life from the [Fund], so long as funds are available, an amount equal to two percent for each five years of service, or major portion thereof, not to exceed fourteen per cent of his average monthly salary for the three highest salaried years while employed by [the Department]").

¹⁰⁶ *Id.* at 637.

¹⁰⁷ *Id.* at 636–39.

¹⁰⁸ *Id.* Gastonia's police pension promises were extended to officers until shortly before the fund's insolvency in 2002. *See id.* at 636–37 (noting that "[i]n 1989, the City issued a pamphlet . . . for a time to potential police officers, not[ing] simply that '[t]he Gastonia Police Department also has a supplemental pension fund which pays 2% for every five years of service,'" and that "in 2001, the Police Department created a website that, for at least a while, contained a statement that '[t]he Police Department also has a supplemental pension fund for police officers'").

¹⁰⁹ *Id.* at 634.

¹¹⁰ *Id.* at 640; *see also Carter v. Greenhow*, 114 U.S. 317, 317 (1885).

¹¹¹ *Crosby*, 635 F.3d at 640–41 ("*Carter* was intended to address the usefulness of that case in providing a framework for the analysis of § 1983 claims invoking parts of the Constitution other than the Contracts Clause . . .").

ground to sustain the retirees' Contract Clause-based Section 1983 claims, and the court affirmed summary judgment for a lack of federal jurisdiction on the remaining state law claim.¹¹²

Most recently, in *Kaminski v. Coulter*, the Sixth Circuit also held that Contract Clause-based claims were not allowed under Section 1983.¹¹³ After Lincoln Park, Michigan was placed under the administration of an emergency manager due to a fiscal crisis, the emergency manager issued orders that stripped retired Lincoln Park municipal employees of healthcare benefits.¹¹⁴ When some retirees challenged the emergency manager's actions, the trial court allowed the case to proceed despite government officials' invocation of immunity defenses.¹¹⁵ The Sixth Circuit reviewed an appeal of the lower court's denial of the defendants' motion to dismiss.¹¹⁶

Before reviewing the merits of the plaintiffs' claims in regards to the motion to dismiss, the Sixth Circuit examined whether Section 1983 allowed Contract Clause-based causes of action.¹¹⁷ To determine the answer to this question, the court reviewed the history of the Contract Clause, noting that Section 1983 descended from the "substantially identical" Revised Statute 1979.¹¹⁸ Revised Statute 1979 was the product of efforts to revise and consolidate federal law including the Civil Rights Act of 1871.¹¹⁹ Eventually, Revised Statute 1979 was recodified as Section 1983.¹²⁰ The court noted that while Section 1983 was transformed into "a powerful tool for checking abuses by state officials" in the mid-twentieth century, the Supreme Court "has never definitively held that an alleged Contracts Clause violation is cognizable as a [Section] 1983 claim."¹²¹

Judge Moore, in her dissent to the *Kaminski* decision, attacked the court's characterization of *Carter* and its reliance on the decision from 1885.¹²² Judge Moore noted that the Supreme Court has clearly instructed courts to liberally construe Section 1983 based on congressional intent for the statute.¹²³ Moreover, Judge Moore observed that the *Carter* Court did not have a Contract Clause-based claim before it; instead the *Carter* Court noted that "a complaint that failed even to allege a violation of the contracts clause could not give rise" to a cause of action under Revised Statute 1979.¹²⁴ In *Dennis*, the dissent also relied upon *Carter* as a preclusion of Commerce Clause-based Section 1983

¹¹² *Id.* at 644.

¹¹³ *Kaminski v. Coulter*, 865 F.3d 339, 347 (6th Cir. 2017).

¹¹⁴ *Id.* at 341 (retirees' healthcare benefits were temporarily replaced with monthly stipends).

¹¹⁵ *Id.* at 343.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 345.

¹¹⁸ *Id.*

¹¹⁹ *Kaminski*, 865 F.3d at 345.

¹²⁰ *Id.* at 345 n.3.

¹²¹ *Id.* at 346.

¹²² *Id.* at 349–51 (Moore, J., dissenting).

¹²³ *Id.* at 349.

¹²⁴ *Id.* at 350.

claims, but the *Dennis* decision rejected such arguments and noted that the plaintiff had not pleaded a Contract Clause-based claim.¹²⁵ Finally, Judge Moore noted that the *Kaminski* decision was at odds with a previous Sixth Circuit ruling in *Welch v. Brown*, where the court had affirmed a preliminary injunction in a Contract Clause-based Section 1983 claim.¹²⁶

The *Kaminski* decision reflects the ambiguity that *Dennis* has left behind. Although *Dennis* provided a framework to determine which rights should be protected by Section 1983, the very nature of its Commerce Clause ruling leaves *Carter*, whatever its precedential value, on the table. *Dennis* clearly indicates a broad construction of Section 1983 to fulfill Congress's intent of protecting rights like those which may be derived from the Contract Clause. In reaching their decisions, the Fourth and Sixth Circuits stumbled by holding *Carter* as precedent despite the clear context that the Supreme Court has repeated throughout recent Section 1983 jurisprudence.

IV. DECISIVELY RESOLVING THE SPLIT: THE SUPREME COURT SHOULD OVERTURN *CARTER* AND RECOGNIZE SECTION 1983 CONTRACT CLAUSE CLAIMS

To protect Contract Clause rights, particularly in contracts with governmental entities, the Supreme Court should overturn *Carter* and expressly recognize Contract Clause-based Section 1983 claims. State contract law is an insufficient protection for individuals in contract with the state. This is because the state can act through legislative powers to abridge the individuals' rights. Due process rights have similarly been held not to be implicated in contractual issues.¹²⁷ Thus, Contract Clause-based Section 1983 claims are the only appropriate vehicle to check the government's application of unilateral power to its debts and obligations.

Modern Supreme Court jurisprudence supports Contract Clause-based Section 1983 claims. Applying the same analysis that the Court outlined in *Dennis*, where the Court recognized the Commerce Clause as the source of individual rights pursuable through Section 1983 actions, the Contract Clause is a source of individual rights.¹²⁸ The plain language of the Contract Clause expresses the intention to create an individual right.¹²⁹ The Contract Clause right is not vague or amorphous in the context of public contracts; there are definitive

¹²⁵ *Kaminski*, 865 F.3d at 350–51.

¹²⁶ *Id.* at 351.

¹²⁷ *Id.* at 348 (“[A] claim for a [due process] violation does not lie where the thrust of the plaintiffs’ argument is simply breach of contract.”).

¹²⁸ *Dennis v. Higgins*, 498 U.S. 439, 448–51 (1991) (applying the *Golden State* test to conclude that the Commerce Clause created an individual right that was enforceable by the judiciary, and that plaintiffs like those who brought the claim were the objects of protection of the rights created in the Commerce Clause).

¹²⁹ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”); see also ELY, *supra* note 24, at 11.

obligations, rights, and terms in public contracts with individuals. Yet, because at least some courts have interpreted *Carter* as precluding Contract Clause-based Section 1983 claims, legal precedence has acted as a barrier to the uniform recognition of Contract Clause-based Section 1983 claims.¹³⁰

The doctrine of stare decisis promotes judicial “obedience to precedence.”¹³¹ However, stare decisis is not a bar on overturning previous decisions.¹³² The Supreme Court may overturn precedent in consideration of factors such as unworkability, age of the precedent, reliance interests at stake, and quality of reasoning in the precedential decision.¹³³ Here, these considerations counsel overturning *Carter* to restore the Contract Clause’s place within Section 1983 jurisprudence.

A. Carter Revisited: Poor Reasoning, Unworkability, and Inconsistency with Related Decisions

The circuit courts’ reliance upon *Carter* demonstrates that *Carter* has become an anathema within Section 1983 jurisprudence—proving that the case was ill-decided, effectively unworkable, and out of step with Section 1983 case law and *Dennis*. Taking *Kaminski* and *Crosby* together, it is clear that despite the Supreme Court’s repeated holdings to the contrary, *Carter* has taken on a legacy that reaches beyond its modest holding. Thus, *Carter* must be directly addressed by the Supreme Court to effectuate the *Dennis* framework and clearly bring the Contract Clause in line with modern Section 1983 jurisprudence.

1. *Carter’s Quality of Reasoning*

Carter has proven ill-reasoned and ill-decided because of the ambiguity the Court created with the decision. *Carter* is a narrow holding, limited to the

¹³⁰ *Kaminski*, 865 F.3d at 345–47; *Crosby v. City of Gastonia*, 635 F.3d 634, 641 (4th Cir. 2011).

¹³¹ James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

¹³² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992)) (“[I]t is common wisdom that the rule of stare decisis is not an ‘inexorable command.’”) (upholding the core holding of *Roe v. Wade*, 410 U.S. 113 (1973)).

¹³³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009)) (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”) (overturning prior decisions that allowed government regulation and suppression of political speech based on the speaker’s identity as a corporation); *Casey*, 505 U.S. at 854 (articulating that the Court weighs “a series of prudential and pragmatic considerations” when deciding to overturn precedent, including “practical workability,” reliance on the decision, development of related legal principles, and factual changes).

pleadings of that case.¹³⁴ The *Dennis* dissent recognized that the Contract Clause created more of an individual right that could be adjudicated under Section 1983 than the Commerce Clause, which the *Dennis* Court held was a valid basis for Section 1983 action.¹³⁵ The Supreme Court has stated that *Carter* was a limited decision, but the lower courts' subsequent actions have proven that the *Carter* myth lives on.¹³⁶

Crosby and *Kaminski* demonstrate that lower courts continue to employ a broader application of the case that they advocate precludes Contract Clause-based Section 1983 claims.¹³⁷ The Fourth Circuit was correct in *Crosby* that the *Dennis* Court's discussion of *Carter* did not overrule that case, yet the *Crosby* court ignored similar guidance regarding *Carter* from the Supreme Court's Section 1983 jurisprudence.¹³⁸ Additionally, the *Crosby* court ignored the proposition that the Supreme Court has repeatedly advanced that *Carter* did not even rule on Contract Clause-based Section 1983 claims, which, from the *Dennis* Court's point of view, would negate a need to overturn *Carter* to bring the Contract Clause under Section 1983's umbrella.¹³⁹ The *Crosby* court also admitted that *Carter* did not "substantively explore" Contract Clause-based Section 1983 claims and was of "limited utility in determining whether

¹³⁴ See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979) (finding that *Carter* was a contract claim and the plaintiff in *Carter* did not plead a Contract Clause-based Section 1983 claim); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939) (observing that *Carter* was not decided on a pleaded Contract Clause-based Section 1983 claim).

¹³⁵ *Dennis v. Higgins*, 498 U.S. 439, 458 (1991) (Kennedy, J., dissenting) ("If the Contracts Clause, an express limitation upon States' ability to impair the contractual rights of citizens, does not secure rights within the meaning of § 1983, it assuredly demands a great leap for the majority to conclude that the Commerce Clause secures the rights of persons. The Commerce Clause is, if anything, a less obvious source of rights for purposes of § 1983, as its text only implies a limitation upon state power."); see also Schwartz & Pratt, *supra* note 23, at 36 ("After *Dennis*, which held that the Commerce Clause was enforceable under § 1983, coupled with the fact that the Commerce Clause, at least in some respects, is a power allocating provision between national and state government, it would appear that the Contract Clause presents a stronger case for [Section 1983] plaintiffs.").

¹³⁶ Compare *Chapman*, 441 U.S. at 613 n.29 ("[*Carter*] held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the Contract Clause], to which he had 'chosen not to resort.'"), and *Hague*, 307 U.S. at 527 (same), with *Crosby v. City of Gastonia*, 635 F.3d 634, 641 (4th Cir. 2011) ("There is little doubt, however, that *Carter* stands even today for the proposition that an attempted [Section] 1983 action alleging state impairment of a private contract will not lie."), and *Kaminski*, 865 F.3d at 346 (finding that *Carter* precludes Contract Clause-based Section 1983 claims but admitting uncertainty whether or not "*Carter* retains much precedential force" in the wake of *Dennis*).

¹³⁷ *Kaminski*, 865 F.3d at 349–50 (Moore, J., dissenting); *Crosby*, 635 F.3d at 641–43.

¹³⁸ See *Crosby*, 635 F.3d at 639–41 (dismissing the *Dennis* Court's discussion of *Carter*).

¹³⁹ See McMahon, *supra* note 54, at 492–94.

Section 1983 might afford a remedy for infringement of federal rights.”¹⁴⁰ Yet the court applied *Carter*’s dicta that Section 1983 does not protect Contract Clause rights.¹⁴¹

Although admitting that it was “unclear” that *Carter* “retain[ed] much precedential force,” in *Kaminski*, the Sixth Circuit analogized the *Carter* decision under Revised Statute 1979 to Section 1983.¹⁴² Since *Carter* noted that the Contract Clause only “indirectly and incidentally” conferred rights to individuals and that the Contract Clause did not create a private cause of action under Revised Statute 1979, the court held that Section 1983 could not sustain a Contract Clause-based claim either.¹⁴³ Again, like the Fourth Circuit in *Crosby*, the court ignored the fundamental characteristic of *Carter* that the Supreme Court has repeatedly highlighted—that *Carter* itself is dicta regarding the Contract Clause and Section 1983. The *Kaminski* court also expressed that, at least in part, their decision was motivated by respect for the Supreme Court’s sole “prerogative [] to overrule one of its precedents.”¹⁴⁴ This suggests that the *Kaminski* court may have been influenced to some degree by the Supreme Court’s denial of certiorari in *Crosby*.¹⁴⁵

This has placed jurisprudence in an odd position: the Supreme Court maintains that *Carter* is of no precedential value for Section 1983 jurisprudence because *Carter* did not rule on Section 1983.¹⁴⁶ Yet some lower courts maintain that the Supreme Court has not overruled *Carter* and that *Carter* stands for the proposition that the Contract Clause cannot serve as a basis of a Section 1983 claim.¹⁴⁷ Considerations of poor reasoning in *Carter* and the subsequent confusion and unintended legacy of the case counsel the Court to overturn *Carter*. The Supreme Court must dispel the *Carter* myth decisively by moving past observations that have been dismissed by lower courts as dicta.¹⁴⁸

¹⁴⁰ *Crosby*, 635 F.3d at 641; see also McMahon, *supra* note 54, at 493 (“In failing to address the recent § 1983 jurisprudence, the court also failed to apply the Golden State test . . . [which] leans in favor of plaintiffs being able to bring Contracts Clause claims pursuant to § 1983.”).

¹⁴¹ *Crosby*, 635 F.3d at 641.

¹⁴² *Kaminski*, 865 F.3d at 346–47.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 347 (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997)).

¹⁴⁵ *Crosby v. City of Gastonia*, 565 U.S. 823 (2011), *denying cert. to Crosby*, 635 F.3d 634 (4th Cir. 2011).

¹⁴⁶ See, e.g., *Dennis v. Higgins*, 498 U.S. 439, 451 n.9 (1991), *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979) (noting *Carter* was a contract claim case and not a Contract Clause-based Section 1983 claim); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939) (same).

¹⁴⁷ See, e.g., *Crosby*, 635 F.3d at 640 (“The Supreme Court in *Dennis* recognized a § 1983 cause of action for the deprivation of rights secured by the Commerce Clause; as such, the continuing vitality of *Carter* and its precedent with respect to the Contracts Clause was not before the *Dennis* Court.”).

¹⁴⁸ See *Kaminski*, 865 F.3d at 350 (Moore, J., dissenting); *Crosby*, 635 F.3d at 641–43; cases cited *supra* note 147.

Practically this means, to address the lower courts' misinterpreted position on the holding of *Carter*, the Supreme Court must address *Carter* directly by overturning the decision.

2. *Carter's Unworkability*

The misapplication of *Carter* by the lower courts has led to the case becoming unworkable within Section 1983 jurisprudence. The circuit split has created an environment where some jurisdictions have recognized Contract Clause-based Section 1983 claims and some have not.¹⁴⁹ Moreover, at least one jurisdiction has moved from recognizing Contract Clause-based Section 1983 claims to not recognizing them in the time since *Dennis* was decided.¹⁵⁰ Some commentators have noted that Section 1983 is the most appropriate legal vehicle for challenging the impairment of contracts in the context of public employment contracts and benefits, yet the contrasting landscape created by *Carter* has removed the Section 1983 protections from many in a time of fiscal challenges when more states and municipalities are seeking to unilaterally change contractual commitments to public employees.¹⁵¹ This incongruity means that the Contract Clause remains out of step with Section 1983 jurisprudence. The circuit split is unsustainable and unworkable. If Section 1983 is to be broadly construed and function expansively to protect constitutional rights, the lower courts' application of *Carter* must be corrected. Thus, considerations of unworkability counsel the Supreme Court to overturn *Carter*.

3. *Reliance Interests in Carter*

The reliance interest in *Carter* is not so strong that it counsels against overturning the case. Certainly, states and state officials have some reliance interest in retaining *Carter* because the case has been interpreted by some circuits to preclude Contract Clause-based Section 1983 claims. However, because of the uncertainty of this interpretation across circuits and because a Contract Clause-based claim was not pleaded in *Carter*, the degree of reliance cannot be relatively strong. Moreover, state and state officials' reliance on defenses to Section 1983, such as immunity, are not affected by an overturn of *Carter*.¹⁵² The overturn of *Carter* merely formalizes a potential vehicle, outside of state law, for individuals to vindicate their constitutional rights.

¹⁴⁹ See cases cited *supra* note 17.

¹⁵⁰ See, e.g., *Kaminski*, 865 F.3d at 351 (Moore, J., dissenting) (citing *Welch v. Brown*, 551 F. App'x 804, 812 (6th Cir. 2014)) (noting that the Sixth Circuit had already implicitly held that a Contract Clause violation can give rise to a cause of action under Section 1983).

¹⁵¹ See, e.g., McDonell, *supra* note 57, at 679.

¹⁵² See Schwartz & Pratt, *supra* note 23, at 24 & n.166 (noting that qualified immunity doctrines apply equally to all types of Section 1983 claims and that questions of qualified immunity versus personal liability turn on the "objective legal reasonableness of the action" in question).

Additionally, individuals whose rights may be violated by the state have a strong reliance interest in the consistency of Section 1983 jurisprudence and in the contracts for which they bargain. Individuals entering contracts rely on the validity and security of the bargain. State employees long promised health benefits do not assume that a case from 1885 bars them from practical and meaningful recourse when the interests secured in the contract are impaired by a state law. Instead, individuals rely upon the rule of law and principles of fairness, counting on the judiciary to ensure their contractual rights are protected from interested state parties. These citizens also rely upon the Court's decisions that recognize a broad construction of Section 1983 in modern Section 1983 jurisprudence. Subsequently, consideration of reliance interests does not counsel against overturning *Carter*.

4. *Inconsistency of Carter with Section 1983 Jurisprudence*

Carter is out of step with Section 1983 jurisprudence.¹⁵³ Application tests for whether or not the Contract Clause creates individual rights counsel recognition that the Contract Clause creates such rights for the purposes of Section 1983.¹⁵⁴ Under the *Dennis* framework, the Contract Clause appears to fit as a constitutional right that can form the basis for a Section 1983 Claim.¹⁵⁵ First, the Contract Clause appears at the forefront of the Constitution and textually prohibits the states from creating laws that impair contract rights.¹⁵⁶ Because *Dennis* found that the type of right is not consequential for Section 1983 purposes, the distinction between whether the Contract Clause protects a property or substantive right becomes unimportant.¹⁵⁷ Second, the Contract Clause appears to satisfy the *Golden State Transit Corp.* considerations. The Contract Clause clearly binds the states. Individual rights asserted under Contract Clause-based claims are inherently specific (i.e., based on discrete contractual obligations) and are not too amorphous to be beyond a court's competency. And, individuals are the intended beneficiary of a law that

¹⁵³ See cases cited *supra*, note 51.

¹⁵⁴ See *supra* Part III.B; see also Schwartz & Pratt, *supra* note 23, at 36–37.

¹⁵⁵ Admittedly, one can argue that the majority's discussion of the Contract Clause in *Dennis* is dicta because the holding explicitly addressed the Commerce Clause. However, the *Dennis* analysis of rights protected by Section 1983 must guide the discussion of the recognition of Contract Clause-based Section 1983 claims. Additionally, the proposition that *Carter* did not actually address Contract Clause-based Section 1983 claims has been oft-repeated by the Court. See, e.g., *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979) (noting *Carter* was a contract claim case and not a Contract Clause-based Section 1983 claim); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939) (same).

¹⁵⁶ U.S. CONST. art. I, § 10, cl. 1. ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

¹⁵⁷ Even *Carter* seems to recognize that the Contract Clause created, at a minimum, the individual right to pursue a claim if a court denied adjudication opportunity. *Carter v. Greenhow*, 114 U.S. 317, 322 (1885) ("[T]he individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation.").

prohibits the making of rules by states that would impair the individuals' rights and obligations. Finally, the *Dennis* court explicitly rejected that *Carter* was a barrier to Contract Clause-based Section 1983 claims, because *Carter* was a narrow decision and a Contract Clause-based Section 1983 claim had not been pleaded in that case.¹⁵⁸

Dennis seems to foreclose the application of *Carter* as a future basis to deny Contract Clause-based Section 1983 claims. The *Dennis* Court directly addressed the narrowness of *Carter*'s holding. And the Court seems to offer clear guidance that Section 1983 should be broadly, liberally, and beneficently construed. If the Commerce Clause has been recognized as a source of individual constitutional rights, which has been described as a less obvious source of rights than the Contract Clause, then the Contract Clause must also be a source of individual rights.¹⁵⁹ Having already held that the Commerce Clause creates individual rights that can be protected through Section 1983 actions, there remains no valid reason to deny the same under the Contract Clause.¹⁶⁰ However, subsequent lower court decisions have demonstrated that *Carter* continues to wield broader influence than the Court counsels.¹⁶¹

The Supreme Court must render a crystalline holding that clearly positions the Contract Clause as an undisputed basis for Section 1983 claims. Indeed, an application of the *Golden State* test to the Contract Clause, the same test that the *Dennis* Court applied to the Commerce Clause, counsels a finding that the Contract Clause creates an individual right that should be protected under Section 1983.¹⁶² Under the *Golden State* test, a court should consider three factors to determine if a federal statute confers a right: (1) whether the statute "creates obligations binding on the governmental unit" or just expresses a legislative preference for particular treatment; (2) whether the interest that the plaintiff asserts is "too vague and amorphous" and beyond the judiciary's

¹⁵⁸ *Dennis v. Higgins*, 498 U.S. 439, 451 n.9 (1991).

¹⁵⁹ *Id.* at 458 (Kennedy, J., dissenting) ("If the Contracts Clause, an express limitation upon States' ability to impair the contractual rights of citizens, does not secure rights within the meaning of § 1983, it assuredly demands a great leap for the majority to conclude that the Commerce Clause secures the rights of persons. The Commerce Clause is, if anything, a less obvious source of rights for purposes of § 1983, as its text only implies a limitation upon state power."); see also Schwartz & Pratt, *supra* note 23, at 36–37 (discussing the application of *Dennis* to the Contract Clause and noting that in a recent court decision it was assumed based on *Dennis* that Section 1983 already applied to the Contract Clause).

¹⁶⁰ McDonell, *supra* note 57, at 679 ("If Section 1983 provides a procedural vehicle for claims like excessive force, deliberate indifference, and freedom of speech—all issues that, like Contract Clause violations, the Constitution directly addresses—there is no reason to deny plaintiffs the ability to bring Contract Clause claims through Section 1983."); see also *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) (per curiam) ("The right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give rise to a cause of action under Section 1983.").

¹⁶¹ See *supra* Part III.C.

¹⁶² *Dennis*, 498 U.S. at 448–49.

competence to enforce; and (3) whether the statute was “intended to benefit the putative plaintiff.”¹⁶³ Just as the *Dennis* Court found that these three factors counseled for individual rights under the Commerce Clause, consideration of the factors and the Contract Clause yields the same result.¹⁶⁴

First, although the state government’s obligation is tempered by its state police powers, states are bound by the Contract Clause.¹⁶⁵ Second, Contract Clause-based claims would not be vague or amorphous because they spring from known and quantifiable contractual obligations. Third, the Contract Clause specifically protects individuals from state impairment.¹⁶⁶ Thus, the plaintiffs in Contract Clause actions are the objects of the protections and rights contemplated by the Contract Clause. Therefore, the denial of an individual right within the Contract Clause that can form the valid basis of a Section 1983 claim is inconsistent with the *Golden State* test and *Dennis*. Considerations of creating a consistent Section 1983 jurisprudence across the nation weigh in favor of overturning *Carter*.

B. Any Potential Adverse Consequences of Overturning Carter and Recognizing Contract Clause-Based Section 1983 Claims Are Mitigated by State Police Powers and Immunities

States and state officials will not face adverse consequences that undermine their state police powers or immunities. Overturning *Carter* and recognizing Contract Clause-based Section 1983 claims will not undermine states or municipalities. The existing framework for evaluating claims will remain.¹⁶⁷

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 449–50 (finding that the Commerce Clause created an individual right, the right was not too vague and within the judiciary’s purview, and it was intended to protect the types of individuals who filed the Section 1983 claim).

¹⁶⁵ See *supra* notes 76–77 and accompanying text (explaining that the *Dennis* majority agreed with the proposition that *Carter* did not foreclose Contract Clause-based Section 1983 claims and Justice Kennedy observed that the Contract Clause was a more likely candidate to be a basis for Section 1983 claims than the Commerce Clause); see also *S. Cal. Gas Co.*, 336 F.3d at 889 (“Though written in absolute terms, the Supreme Court narrowly construes the Contract Clause to ensure that local governments can effectively exercise their police powers. State governmental entities ‘must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.’ However, a ‘higher level of scrutiny is required’ when the legislative interference involves a public rather than a private obligation.”) (internal citations omitted).

¹⁶⁶ See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”) (emphasis added). Contractual parties are necessarily the recipients of the protections of the Contract Clause because they are individuals who are impaired by the types of laws prohibited by the contract cause.

¹⁶⁷ See *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (holding that whether a Contract Clause violation has occurred is a question of whether a substantial impairment of a contractual right existed, the extent of the impairment, whether the state utilized an “‘appropriate’ and ‘reasonable’ way to advance ‘a significant and legitimate public

Instead, Contract Clause-based Section 1983 claims will merely create a legal vehicle through which plaintiffs can protect their rights from infringement and abuses of state and local officials. The potential immunities available to states and state actors are not affected by this decision and are widely recognized under Section 1983 doctrine. Moreover, the power of the state to act to address emergencies will not be abrogated. States and municipalities are already bound to respect individual Contract Clause rights.¹⁶⁸ Indeed, past concerns about more forceful interpretations of Contract Clause rights have not come to fruition, and despite the stronger Contract Clause standard espoused in *United States Trust*, states and municipalities continue to effectively deal with emergencies.¹⁶⁹ But a new tool will be available to check these actions and hold state and local actions in check if they do impair individual constitutional rights.

C. Restorative Effects of Overturning *Carter*

As discussed in this Part, analysis of *Carter* indicates that the decision should be overturned. While not strictly essential to the recognition of Contract Clause-based Section 1983 claims, the overturning of *Carter* would remove the primary source of confusion amongst the circuits and ensure that future court analysis of Section 1983 and the Contract Clause is consistent with *Dennis*, which demands a broad interpretation of Section 1983.¹⁷⁰ Constitutional Contract Clause rights, not just state contract law, lie at the heart of claims involving state contracts abridged under governmental authority.¹⁷¹ Thus, the Contract Clause rights should be vindicated through Section 1983 claims.

Further, the protections and relief of Section 1983 will encourage individuals to assert their rights by affording damages that include legal fees if a cause of action is meritorious.¹⁷² By removing a barrier to the vindication of Contract Clause rights, more individuals may elect to pursue their rights, thereby

purpose,” the level of interference with the parties’ reasonable expectations, and whether the law in question “prevents the party from safeguarding or reinstating his rights”).

¹⁶⁸ See, e.g., *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 16 (1977) (“Both [*Home Building & Loan Assn. v. Blaisdell* and *El Paso v. Simmons*] eschewed a rigid application of the Contract Clause to invalidate state legislation. Yet neither indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory. Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution.”) (emphasis added).

¹⁶⁹ *Id.* at 16; Bleznick, *supra* note 34, at 213 (warning that the *United States Trust Co.* decision could “interfere with effective operation of state and local government”); McDonell, *supra* note 57, at 661 (noting that state and local governments resolved budgetary emergencies by eliminating more than \$50 billion of pension benefits from 2007 to 2011).

¹⁷⁰ *Dennis v. Higgins*, 498 U.S. 439, 443, 445 (1991).

¹⁷¹ See McDonell, *supra* note 57, at 675.

¹⁷² See McMahon, *supra* note 54, at 468–69; see also Beermann, *supra* note 43, at 13–16 (explaining how legal fees and different remedies are available through Section 1983 actions, creating a greater incentive for pursuing litigation).

holding government entities more accountable for their actions. Recognition of Contract Clause-based Section 1983 claims will level the playing field when the government is a contractual party.¹⁷³ Contract Clause-based Section 1983 claims will likely lead to better government decision making and transparency through this accountability.¹⁷⁴ Future crises, like the pension collapse in Lincoln Park, may be averted because individuals will be empowered to vindicate their rights and government officials will be aware that they can be held accountable.¹⁷⁵ While fiscal emergencies are real and government entities need to be empowered to address them, individuals' rights should not be abridged without review or challenge. Contract Clause-based Section 1983 claims place a check on governmental actions that negate contractual obligations to individuals.

V. CONCLUSION

Carter has had an unintended, yet enduring, chilling effect on recognition and protection of individual Contract Clause rights. Observations made in dicta in an 1885 decision should not be read to bar Contract Clause-based Section 1983 claims and protections. Section 1983 is the most appropriate vehicle to protect individual rights when states unilaterally act to alter contracts to which they are a party.¹⁷⁶ Remedies under state laws are inadequate and do not work to protect the constitutional rights guaranteed by the Contract Clause because they do not afford plaintiffs a disinterested forum, are created by the states, and discourage plaintiffs from vindicating their rights.¹⁷⁷ Moreover, denying the advantages of Section 1983 claims disparately impacts minorities and the poor, who are less likely to have representation and yet are more vulnerable. Extending Section 1983 jurisprudence to formally recognize Contract Clause-based Section 1983 claims helps protect the constitutional rights of some of the United States' most vulnerable segments of the population.¹⁷⁸

Additionally, the capacity of states and municipalities to effectively deal with emergencies and exercise their police powers will not be diminished by Contract Clause-based Section 1983 claims. Indeed, states and municipalities are already bound by the U.S. Constitution.¹⁷⁹ Recognition of Section 1983 claims merely gives individuals a better means of protecting their rights from

¹⁷³ See Buckwalter-Poza, *supra* note 53.

¹⁷⁴ Indeed, this is one of the main purposes of Section 1983. See *supra* note 41 and accompanying text.

¹⁷⁵ See McDonell, *supra* note 57, at 670; see also *Kaminski v. Coulter*, 865 F.3d 339 (6th Cir. 2017).

¹⁷⁶ See McDonell, *supra* note 57, at 678 (noting the appropriateness and merits of Contract Clause-based Section 1983 claims).

¹⁷⁷ See Buckwalter-Poza, *supra* note 53; McMahon, *supra* note 54, at 474–76.

¹⁷⁸ See Buckwalter-Poza, *supra* note 53.

¹⁷⁹ *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 16 (1977).

impairment and checking potential abuses by interested state parties. Existing qualified immunity doctrine would not be compromised by recognition of Contract Clause-based Section 1983 claims.¹⁸⁰

The Supreme Court should decisively update Section 1983 jurisprudence by overturning the *Carter* decision. The overturn of *Carter* is necessary because lower courts have maintained that *Carter* stands for the proposition that Contract Clause-based Section 1983 claims are barred by precedent. *Carter* is being applied by lower courts in a way that exceeds the purpose of the original decision. This has caused Contract Clause causes of action to fall out of line with Section 1983 jurisprudence.

The considerations for overturning precedent counsel *Carter*'s overturn. First, *Carter* has proven ill-reasoned and ill-decided. *Carter* was a narrow holding, limited to the pleadings of that case. A Contract Clause-based Section 1983 claim was not pleaded, and the Court should not have mused on the matter. Second, the lower courts have applied *Carter*'s dicta to Contract Clause-based Section 1983 claims and ignored more modern Section 1983 jurisprudence. This misapplication has resulted in a circuit split that is unworkable. The Contract Clause is a valid basis for Section 1983 claims and all circuits should apply the clause evenly. Third, reliance interests in maintaining *Carter* counsel overturning the holding. Lower courts do not apply the case consistently. States are already bound by the Contract Clause. Fourth, *Carter* has left inconsistency in Section 1983 jurisprudence. Applied to the Contract Clause, the *Golden State* test would indicate that the Contract Clause is a source of individual rights. *Dennis* holds that such rights are within the scope of the protections afforded by Section 1983. Thus, it is time for the Supreme Court to advance the Contract Clause into modern Section 1983 jurisprudence by overturning *Carter* and recognizing Contract Clause-based Section 1983 claims.

¹⁸⁰ See SCHWARTZ, *supra* note 44, at 10.